Office-Supreme Court, U.S.
FILED
FEB 17 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—v.—

CARVEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT RAKESTRAW'S DAIRY PRODUCTS, INC.

WILLIAM G. MULLIGAN
Attorney for Respondent
Rakestraw's Dairy Products, Inc.
36 West 44th Street
New York, N. Y. 10036

WILLIAM G. MULLIGAN
DORIS CARROLL
Of Counsel

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BRIEF FOR RESPONDENT RAKESTRAW'S DAIRY PRODUCTS, INC.

Question Presented

Does the evidence against the Rakestraw dairy upon which the *Pierce, Giberman,* and *Pazdro* petitioners rely, a Rakestraw-Carvel contract in which the dairy agreed to produce secret formula Carvel ice cream mix for Carvel and to deliver that Carvel mix and no other to Carvel stores in its Pennsylvania area, establish that Rakestraw was engaged in a conspiracy to boycott those petitioners of the kind which is *per se* in violation of the Sherman Act?

ARGUMENT

The courts below correctly held that there had been no showing of participation by the Rakestraw dairy in any conspiratorial boycott against the petitioners violative of the antitrust laws.

The petitioners who were plaintiffs in the *Pierce, Giberman,* and *Pazdro* actions alleged that contracts between Rakestraw's Dairy Products, Inc. ("Rakestraw") and Carvel, in which the dairy agreed to produce secret formula Carvel ice cream mix for Carvel and to deliver that Carvel mix and no other to Carvel stores in its area (Pl. Ex. 15; R. 337, 16), constituted boycott agreements which were in violation of the Sherman Act.

The private antitrust suits were tried before the District Court for the Southern District of New York on the issue of liability alone; the plaintiffs limited their evidence to written agreements and other documents, and made no claim other than that their evidence would establish *per se* violations of the antitrust laws (Pretrial Order No. 5; R. 148). After a trial before District Judge Dawson sitting without a jury, the three complaints against Rakestraw and other defendants were dismissed, and the Court of Appeals for the Second Circuit affirmed the judgments.

The respondent Rakestraw dairy processes dairy products at its plant in Mechanicsburg, Pennsylvania, and sells and distributes those products in the Pennsylvania area. In 1956 Rakestraw contracted with Carvel Stores of New York, Inc., that it would make a perishable fluid ice cream mix for Carvel, following Carvel's secret formula and using stabilizer and emulsifiers furnished by Carvel, and would deliver that Carvel mix to Carvel stores in the area to be serviced by Rakestraw (Pl. Ex. 15; R. 337, 16, 183, 199).

Upon the trial of these cases the 1956 Rakestraw-Carvel contract was introduced into evidence as part of Plaintiffs' Exhibit 15 (R. 337, 16). That exhibit is the only piece of evidence which relates in any way to Rakestraw; the petitioners made no attempt to show that Rakestraw was aware of the identity or even the existence of any other person with whom Carvel may have contracted for the supply of cones, syrups, toppings, or paper products, or for the supply of ice cream mix in areas other than Pennsylvania. The District Court noted of the evidence introduced by the plaintiffs against the dairy defendants Rakestraw and Hood:

> "The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies" (R. 51).

It is on this Rakestraw-Carvel supply contract that petitioners would predicate Rakestraw's liability for alleged *per se* violations of the antitrust laws, *per se* violations having been described by this Court as:

> "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 5 (1958).

The contract provisions singled out by petitioners as illegal *per se* according to the stern test of *Northern Pac.*

Ry., supra, are paragraph 1 (R. 338), in which Rakestraw agreed to manufacture and sell to Carvel all the "Carvel Mix" required by Carvel dealers in the area serviced by Rakestraw, and subparagraph 5(f) (R. 341), in which Rakestraw agreed to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind."

The District Court and all of the judges of the Court of Appeals concluded, contrary to petitioners' contentions, that these Rakestraw-Carvel contract provisions are not violative of the Sherman Act. Both courts agreed that Carvel was free to insist that Rakestraw produce Carvel's secret formula mix for sale solely to Carvel and to no one else (District Court Opinion, R. 52; Court of Appeals Opinion, R. 449). They further agreed that, so far as direct sales of non-Carvel ice cream to petitioners were concerned, petitioners had failed to show that Rakestraw was ever asked to make such sales and that it had refused to do so; and that in any case such an agreement by Rakestraw and Carvel, being two persons not in competition with each other, would not have constituted an illegal boycott (District Court Opinion, R. 53; Court of Appeals Opinion, R. 449). It is respectfully submitted that these determinations of the courts below with respect to respondent Rakestraw are correct in all respects, and should be affirmed.

A. The contract provision requiring Rakestraw to sell secret formula Carvel Mix solely to Carvel is patently proper.

Chief Judge Lumbard wrote for the Court of Appeals:

> "With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged

not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition" (R. 449).

District Judge Dawson wrote to the same effect:

"As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious" (R. 52).

No extensive citation of authority is necessary for the proposition that it is patently proper for Rakestraw to agree to sell only to Carvel the ice cream mix it makes according to a secret formula divulged to it by Carvel upon just such a condition.

Neither can this Pennsylvania dairy's promise to produce for Carvel all of the secret-formula Carvel Mix required by Carvel stores in the area be characterized as an exclusive dealing arrangement proscribed by the Clayton Act. As the trial court noted (R. 52), petitioners did not even allege in their complaints that the provisions of the contract under which Rakestraw agreed to furnish all of Carvel's requirements for Carvel Mix were illegal in them-

selves, and upon the trial of the cases petitioners failed to prove that the "all requirements" provision was in fact illegal by the tests of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961), and *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).

B. The contract provision requiring Rakestraw to deliver only Carvel Mix to Carvel stores is intended to prevent fraudulent substitution of an inferior mix, not to prohibit Rakestraw from selling non-Carvel branded ice cream to petitioners directly.

Petitioners contend that the contract provision in which Rakestraw and Carvel agree that Rakestraw "will deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind" (R. 341) is *per se* in violation of the Sherman Act because, they say, it obliges Rakestraw to refrain from selling non-Carvel ice cream directly to petitioners. Rakestraw respectfully submits that, as a matter of contract interpretation, that contract provision in fact requires nothing of the kind: The provision is contained in a contract treating only of the manufacture and delivery of secret formula Carvel Mix, and the clause could only have been intended to prevent Rakestraw from substituting inferior mixes for the high quality Carvel ice cream mix in the course of delivery.

It should be noted as an initial matter that, as both of the courts below observed, petitioners never showed that Rakestraw had been requested to make sales directly to them and had refused (R. 53, 449). District Judge Dawson also said (R. 63):

> "As a practical matter, it may be noted that there is no evidence that the Carvel operators are particularly interested in selling other kinds of ice cream. The

testimony that was given during the trial of the fraud aspect of these cases indicated that the operators were more concerned with expanding their line of business into other fields than with selling additional brands of ice cream."

To determine the intent and meaning of a particular provision it must be read in conjunction with the entire contract. Subparagraph 5(f) of the Rakestraw-Carvel contract in issue (R. 341) is the sixth section of a paragraph entitled "Delivery of Carvel Mix" which sets forth the manner in which Carvel Mix shall be ordered, transported, and delivered, and Rakestraw's duties in connection therewith. The full paragraph reads in its entirety (R. 340-41):

"5. (a) Carvel Dealers in the Area may transmit orders directly to the processor for their requirements of Carvel Mix. The Processor shall fill said orders promptly and deliver the same to the respective Carvel Stores as soon as possible.

"(b) The Processor shall transport and deliver the Carvel Mix to the respective Carvel Stores, pursuant to orders received as aforesaid, in suitable trucks operated by the Processor, which shall not be used for any other purpose. Said trucks shall be painted all white at the Processor's expense and be identified with Carvel's insignia at the cost and expense of the Processor. Identification insignia shall be supplied by Carvel at its own cost and expense.

"(c) The Processor shall procure a delivery receipt for each delivery made and send same to Carvel.

"(d) Prior to the fifth business day of each month, the delivery agent shall submit to Carvel, a Statement

of the total cans of Carvel Special Formula Mix delivered to each store during the previous month.

"(e) The Processor will not itself represent, or permit any of its employees to represent that the Processor or any of its employees are the representatives of Carvel, and will indemnify and hold Carvel and its affiliates free and harmless from any liability which may be incurred by any act of any such person in violation of the terms of this paragraph; without limiting the generality of the foregoing, the Processor shall save Carvel free and harmless from any liability for damage to person or property caused by the act of any route man or delivery man driving one of the trucks marked with Carvel's insignia, as aforementioned.

"(f) The Processor agrees that he will deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind.

"(g) It is understood and agreed that the Processor's obligation to manufacture and supply Carvel Mix, as set forth in this agreement, shall at all times be subject to delays that may be due to strikes, acts of God, official embargoes, or wartime restrictions."

Clearly, the covenant by Rakestraw to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind" was intended, as part of Carvel's program to ensure quality control and uniformity of product, to preclude Rakestraw from substituting some other mix for the Carvel-formula mix in orders from Carvel dealers for mix to be used in the distinctive Carvel swirl-ejection freezers for the preparation of an ice cream product to be sold under the Carvel trademark. The object of the Rakestraw-Carvel contract is to

effect manufacture and delivery of Carvel Mix and payment to Rakestraw therefor; it is not to prohibit Rakestraw from selling to petitioners or to anyone else, for its own account, other mixes which might be used for the production of a non-Carvel branded ice cream, or other packaged brands of hard ice cream.

C. Even if the Rakestraw-Carvel contract were deemed to prohibit Rakestraw from dealing with or selling to petitioners directly, it would not be illegal *per se* under the antitrust laws.

1. *An agreement by two persons not in competition with each other cannot constitute an illegal boycott.*

Assuming *arguendo* that the Rakestraw-Carvel agreement requires Rakestraw to refrain from dealing with or selling to petitioners directly, those contract provisions do not in the circumstances constitute *per se* violations of the antitrust laws.

In the first place, the Rakestraw-Carvel contract, so interpreted, prohibits only one party, Rakestraw, from dealing with petitioners. An agreement between two parties that prohibits only *one* of the parties from dealing with third persons is not a "group boycott" illegal under the antitrust statutes. See Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 n. 1 (1958) ("An agreement between *A* and *B* that *A* will not deal with *C* is not a group boycott since there is not the requisite refusal by two or more parties to deal with another."); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957). And it is well established that, absent a monopolistic purpose, an individual refusal to do business with

any person is not a violation of the antitrust laws, *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919).

Both of the courts below so held with respect to the Rakestraw-Carvel agreement. The District Court said (R. 53): "[E]ven if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott." And Chief Judge Lumbard wrote for the Court of Appeals (R. 449): "Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal."

Petitioners' brief to this Court rings with ominous mention of a "concert of action of the suppliers" and a "Carvel supplier entente" (Petitioners' Brief, p. 51). Undoubtedly this is done in an effort to make applicable to the Rakestraw-Carvel contract cases like *Associated Press* v. *United States*, 326 U. S. 1 (1945), and *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). But in these Carvel cases at bar there is not the slightest indication, even inferentially, that Rakestraw was aware of any arrangements Carvel might have made with suppliers of cones, syrups, toppings, or paper products, or with suppliers of perishable ice cream mix in places outside of Rakestraw's Pennsylvania delivery area. There is not here the mischief of a concerted refusal to deal of the kind proscribed by the antitrust laws.

2. The Rakestraw-Carvel contract had a reasonable economic basis and did not serve as an instrument for unduly restraining trade.

Even if it be conceded that the Rakestraw-Carvel contract was in a sense in restraint of trade because it was

an exclusive arrangement for the supply of ice cream mix, that exclusive arrangement, as carried out, had a reasonable economic basis and did not serve as an instrument for unduly restraining trade, *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

In *Bascom Launder, supra,* a treble damage suit, the Court of Appeals held that it was reversible error for the trial court to charge the jury that an exclusive distributing agreement between the defendant Telecoin Corporation and Bendix Home Appliances, Inc., the manufacturer

> "'amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law'" (204 F. 2d at 334).

The Court, relying on *United States* v. *Bausch & Lomb Optical Co., supra,* held that the exclusive arrangement would be unlawful only if plaintiffs proved that Bendix had a monopoly in fact of washing machines, or that the exclusive arrangement, as carried out, was

> "without a reasonable economic basis and merely served as an instrument for unduly restraining trade" (204 F. 2d at 335).

In *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944), the defendant Bausch & Lomb had an exclusive manufacturing arrangement with the defendant Soft-Lite Lens Co. pursuant to which Bausch & Lomb manufactured pink tinted lenses exclusively for Soft-Lite and agreed not to market or manufacture the lenses for anyone else. In addition, Bausch & Lomb owned con-

trolling stock in six wholesale distributing companies which were customers of Soft-Lite. The trial court found that Bausch & Lomb was "vitally interested" in the prices set by Soft-Lite on sales to wholesalers and in the prices charged to consumers (45 F. Supp. at 393) and that Bausch & Lomb was "satisfied that Soft-Lite would so market the product as to justify" the exclusive manufacturing arrangement (*id.* at 395).

The District Court dismissed the complaint against Bausch & Lomb despite its granting of relief against Soft-Lite, and this Court affirmed the dismissal, thus holding that "the agreement of Bausch & Lomb not to sell tinted glass or lenses to any competitor of Soft-Lite and not to compete with Soft-Lite in the marketing of any pink tinted lens" (321 U. S. at 718-719) does not unreasonably restrain commerce in violation of the Sherman Act. As Judge Rifkind's opinion in the district court pointed out (45 F. Supp. at 398-99);

> "In determining whether a restraint is unreasonable the guidance of the classic opinion in United States v. Addyston Pipe & Steel Co., 6 Cir., 1898, 85 F. 271, 46 L. R. A. 122, affirmed 175 U. S. 211, 20 S. Ct. 96, 44 L. Ed. 136, is still available. It is too well known to require quotation here. The standards there set forth appear in substantially similar form in the Restatement of the Law of Contracts of the American Law Institute, §§515, 516. §516 reads as follows:
>
> "'§516. Instances of Reasonable Restraints.
>
> "'The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly: (a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way as to injure the value of the property or the business sold;

"'(b) A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor;

"'(c) A bargain to enter into partnership with an actual or possible competitor;

"'(d) A bargain by a partner not to interfere by competition or otherwise with the business of the partnership while it continues, or subject to reasonable limitations after his retirement;

"'(e) A bargain to deal exclusively with another;

"'(f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.'

* * * * * *

"In the case at bar the main purpose of the contract is to provide a source of supply for Soft-Lite. The restraining covenant is for the protection of the purchaser who is spending large sums to develop his good will and enlarge the public patronage of a relatively new article of commerce. The arrangement, though not a partnership in legal form, is functionally a joint enterprise in which one will produce and the other market the commodity. United States v. Addyston Pipe & Steel Co., supra, 85 F. at page 281.

"It is clearly a 'bargain to deal exclusively with another,' Restatement, supra, §516.

"It is not necessary to find and I do not find that Soft-Lite's specifications for the glass constituted a

> secret formula for the protection of which a restraining covenant would be proper. There is nothing contrary to public policy in the arrangement. Nothing in the evidence indicates that Bausch & Lomb enjoyed a monopoly in the manufacture of glass for lenses, whether pink or otherwise. On the contrary, the evidence is clear that other manufacturers of lenses have had access to pink glass from other sources and that the success of Soft-Lite has stimulated emulation and competition. See Federal Trade Commission v. Raymond Bros.-Clark Co., 1924, 263 U. S. 565, 44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114.
>
> "I conclude that the exclusive arrangement between Bausch & Lomb and Soft-Lite taken independently of the distribution system is not violative of the Sherman Act."

Similarly the main purpose of the Rakestraw-Carvel agreement is to provide a source of supply for Carvel. The restrictive covenant, if there be one, is "for the protection of the purchaser [Carvel] who is spending large sums to develop his good will . . . ." The Carvel dealer is selling ice cream in a specially designed building bearing large "Carvel" signs, using Carvel equipment with the Carvel name on it, and is thereby representing to the public that Carvel ice cream is being sold. The public has a right to expect ice cream sold under the Carvel name to be of a uniform quality and Carvel's agreement with its suppliers reflects its efforts to maintain that quality. It is obviously necessary for the protection of the good will that Carvel has developed that a uniform Carvel Mix, prepared according to the Carvel secret formula, be used by the Carvel dealers, rather than different mixes of varying standards and quality.

Carvel's concern with the quality of the product to be sold under its trade name is apparent from the Rakestraw-Carvel agreement of May 14, 1956 (Pl. Ex. 15; R. 337, 16). That agreement provides that "only materials of the highest quality shall be used" (R. 339); that "Carvel Mix shall be packed in sanitary ten (10) gallon cans, free and clean of any rust spots" (R. 340); that "employees of Carvel shall have the right (but not the obligation), at any and all reasonable business hours of the day, to enter and inspect the plant of the Processor [Rakestraw] manufacturing Carvel Mix and the distributing depots of the Processor, if any, and shall also have the right (but not the obligation) to inspect all materials, machines and equipment used in conjunction with manufacture of Carvel Mix, wherever located" (R. 344); that "Carvel may return any Carvel Mix delivered in unsanitary cans or any mix that, in its reasonable opinion of authorized personnel, does not conform to the formula for Carvel Mix herein referred to, or in the manufacture of which materials of inferior quality have been used. Carvel may refuse to accept further deliveries until the Processor has demonstrated to Carvel that it has taken appropriate action to prevent the reoccurrence of any such deficiency" (R. 345).

It has never been contended that Rakestraw occupied a monopoly position in the manufacture of ice cream, and the reasonable economic basis for a refusal to sell directly to Carvel dealers is readily apparent. Hence petitioners have failed to meet either of the tests of *per se* Sherman Act violation established in the cases of *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944), and *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

CONCLUSION

Respondent Rakestraw's Dairy Products, Inc., respectfully submits that the judgments of the Court of Appeals for the Second Circuit affirming judgments dismissing the complaints against Rakestraw's Dairy Products, Inc., were correct in all respects, and should be affirmed.

Dated: New York, New York.
February 16, 1965

Respectfully submitted,

WILLIAM G. MULLIGAN
Attorney for Respondent
Rakestraw's Dairy Products, Inc.
36 West 44th Street
New York, N. Y. 10036

WILLIAM G. MULLIGAN
DORIS CARROLL
Of Counsel